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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BRADLEY GERALD SHUBIN,

Defendant and Appellant.

E073267, E074598

(Super.Ct.No. FVI18002952)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Affirmed in part, reversed in part, and remanded with directions.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Christine Levingston Bergman, Melissa Mandel, and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

After a jury trial, defendant and appellant Bradley Gerald Shubin was convicted of felony vandalism causing damage that exceeded \$400 (Pen. Code, § 594, subd. (a)).¹ Defendant brought a motion to reduce the offense to a misdemeanor pursuant to section 17, subdivision (b). The trial court denied defendant's motion. Defendant appealed.

Defendant has two pending appeals which have been consolidated. In the first, defendant argues the trial court erred when it denied his motion under section 17, subdivision (b), because it was under the mistaken impression it did not have discretion to grant the motion. The People agree. We also agree and reverse and remand for a new sentencing hearing to allow the trial court to exercise its discretion.

In the second, defendant argues the trial court abused its discretion by awarding \$4,000 in direct restitution because this number was not supported by sufficient evidence. We disagree and affirm the trial court's restitution order.

II. FACTUAL AND PROCEDURAL BACKGROUND²

On October 3, 2018, law enforcement responded to the closed campus grounds of the University Preparatory School in Victorville. They found the gate to the school cut open, and found defendant leaning over an in-ground hatch containing multiple copper wires with bolt cutters in his hands. Defendant appeared to be cutting something. When

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Because the facts of defendant's crime are not at issue in this appeal, we have abbreviated the statement of facts.

the officer approached and apprehended defendant, the officer found multiple copper wires in the in-ground electrical box were cut and found loose cut copper wires on the ground near where defendant was standing. The officer also discovered an above-ground electrical box with multiple cut copper wires inside.

The San Bernardino County District Attorney charged defendant by information with felony vandalism with the amount of damage exceeding \$400 (§ 594, subd. (a); count 1) and attempted grand theft of copper wire valued over \$950 (§§ 487, subd. (a), 664; count 2). On June 20, 2019, a jury found defendant guilty of count 1 and not guilty of count 2. The jury also found true the allegation that the damage was greater than \$400.

Defendant brought a motion to reduce the offense to a misdemeanor pursuant to section 17, subdivision (b), which the sentencing court denied on July 18, 2019. In denying defendant's motion, the sentencing court stated "the reason that's going to be denied is that the jury did find it was \$400 or more. So by operation of law, that's a felony. So I am not even going to consider granting the 17(b) due to the fact that the jury found it to be a felony." Defendant was sentenced to the mitigated term of 16 months in county jail. Defendant timely appealed this order.

Afterwards, the trial court held a restitution hearing. On January 24, 2020, the trial court ordered defendant to pay \$4,000 in direct victim restitution. Defendant timely appealed this order.

III. DISCUSSION

A. *The Trial Court Erred by Concluding it Could Not Reduce Defendant's Crime to a Misdemeanor*

In the appeal from the trial court's order denying his motion under section 17, subdivision (b), defendant argues that the trial court erred when it denied his motion under section 17, subdivision (b), because it believed it did not have discretion to consider the motion. The People agree. Both parties request we remand for a new sentencing hearing. We agree with the parties and their proposed remedy.

“Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) The only reason to depart from this general rule is if “the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*), quoting *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

“Penal Code section 17, subdivision (b), rests the decision whether to reduce a ‘wobbler’ from a felony to a misdemeanor solely “‘in the discretion of the court.’”” (*People v. Bonilla* (2018) 29 Cal.App.5th 649, 660-661.) Vandalism causing more than \$400 in damages is a wobbler, as it may be punished “by imprisonment pursuant to

subdivision (h) of Section 1170 or in a county jail not exceeding one year.” (§ 594, subd. (b)(1); see *People v. Bonilla*, at pp. 660-661.)

The record reveals that the sentencing court was under the mistaken impression that the jury’s finding that defendant caused more than \$400 in damage rendered his crime a felony “by operation of law.” Thus, it is clear from the record that the sentencing court mistakenly believed that vandalism causing damage greater than \$400 is a felony and not a wobbler, and therefore believed it had no discretion under section 17, subdivision (b), to reduce defendant’s conviction. There is also little indication from the record about what the court would have done but for this mistake, making it impossible to conclude that the court “would have reached the same conclusion ‘even if it had been aware that it had . . . discretion’” to do so. (*Gutierrez, supra*, 58 Cal.4th at p. 1391.)

Accordingly, we remand the case to the trial court to permit it to hold a new sentencing hearing and reconsider defendant’s motion under section 17, subdivision (b).

B. The Court Did Not Abuse its Discretion in Determining the Restitution Amount Owed

In his subsequent appeal, defendant argues the trial court abused its discretion by ordering direct victim restitution of \$4,000 because there was insufficient evidence supporting the claimed damages.

Both the California Constitution and Penal Code section 1202.4 entitle victims of a crime to restitution from the person convicted of that crime. (Cal. Const., art. I, § 28, subd. (b).) Section 1202.4, subdivision (a)(1), states “that a victim of crime who incurs

an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.” Specifically, “in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.” (§ 1202.4, subd. (f).) Section 1202.4 thus limits restitution awards for economic loss to losses “resulting from the criminal conduct supporting the crimes of which the defendant was convicted.” (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1247.)

“Victims are entitled to an amount of restitution so as to make them whole but not more than their actual losses arising out of the defendant’s criminal conduct.” (*People v. Nichols* (2017) 8 Cal.App.5th 330, 342 (*Nichols*)). “A restitution order is intended to compensate the victim for its actual loss and is not intended to provide the victim with a windfall.” (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172.)

“‘The burden is on the party seeking restitution to provide an adequate factual basis for the claim.’ [Citation.] ‘The standard of proof at a restitution hearing is preponderance of the evidence, not reasonable doubt.’ [Citation.] Once the prosecution has made a prima facie showing of the victim’s loss, ‘the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim.’” (*People v. Jessee* (2013) 222 Cal.App.4th 501, 506-507.)

“We review the trial court’s restitution order for abuse of discretion. [Citation.]” (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1048-1049.) “[T]he court’s discretion in setting the amount of restitution is broad, and it may use any rational method of fixing the amount of restitution as long as it is reasonably calculated to make the victim whole.” (*Nichols, supra*, 8 Cal.App.5th at p. 342.)

There was sufficient evidence to conclude defendant’s actions damaged the copper wire. Police apprehended defendant with bolt cutters, a multimeter, and a trash bag with copper wire cuttings. Moreover, the school district’s Director of Facilities Maintenance and Operations, Brett J., testified that two or three days earlier the wiring was intact. Substantial evidence supported the trial court’s implicit conclusion that defendant was responsible for the damage to the copper wiring.

Nor was it abuse of discretion to conclude that the actual value of the damage done totaled \$1,667.41. In reaching that number, the court relied on both the professed expertise of Brett J. and an actual invoice pricing 200 feet of copper wire at \$1,667.41. This number was also incorporated into the probation officer’s report. “[T]he trial court is entitled to consider the probation report when determining the amount of restitution. A property owner’s statements in the probation report about the value of her property should be accepted as prima facie evidence of value for purposes of restitution. [Citation.]” (*People v. Foster* (1993) 14 Cal.App.4th 939, 946-947, superseded by statute on other grounds as stated in *People v. Birkett* (1999) 21 Cal.4th 226, 238-245.)

As the representative of the property owner, Brett J.'s estimate was prima facie evidence of the actual costs of repair. Once Brett J. made these estimates, and the court could properly conclude there was some basis for them, the burden shifted to defendant to prove this estimate wrong. Here, defendant attempted to meet this burden by objecting that Brett J.'s training and experience was not sufficient to allow him to make an accurate estimate of costs. But again, even if we agree Brett J. does not have the necessary expertise to accurately estimate these costs under normal circumstances, his statements here were enough to shift the burden, and defendant did not present any actual evidence that these estimates were wrong. In other words, defendant offered no evidence suggesting Brett J.'s estimate was wrong, just that Brett J.'s estimate was an estimate. However, property owners are allowed to make estimates of the costs of restitution, and trial courts are allowed to rely on those estimates.

Moreover, the trial court could and did conclude Brett J. had sufficient expertise to make a reliable estimate. Brett J. testified at the trial that he had approximately 19 years of experience in various facilities positions which required obtaining quotes for electrical systems maintenance and repairs. He was the person in charge of pricing and overseeing any repairs to the school facility. Moreover, he had extensive, specific knowledge of copper wire and copper wire repair. He was responsible for obtaining material and labor cost quotes for repairing the school's electrical systems, including copper wire repair and replacement. Indeed, Brett J. apparently had somewhat extensive knowledge about copper wire itself, as he testified at some length regarding the differences between types

of copper wire and explained how different types of copper wire might be used in different electrical systems or installed to achieve different purposes. Thus, the trial court was justified in concluding this experience and training gave Brett J. adequate general and specific expertise to provide a reliable opinion on what it would likely cost to repair the damage done by defendant.

Thus, Brett J.'s estimated costs of repair formed an adequate factual basis for the restitution award ordered, and defendant failed to rebut these estimated costs.

Accordingly, we affirm the restitution order.

IV. DISPOSITION

The matter is remanded for the trial court to consider whether to reduce defendant's conviction for vandalism to a misdemeanor. In all other respects, the judgment is affirmed.

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FIELDS
J.

We concur:

MILLER
Acting P. J.

CODRINGTON
J.